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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 44 M.J. 442. The opinion of the Air Force Court of Criminal Appeals (Pet. App. 25a-53a) is reported at 41 M.J. 683.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 18, 1996. On December 10, 1996, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 16, 1997. The petition was filed on that date and was

granted on May 19, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1259(3).

RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

Military Rule of Evidence 707 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth and Sixth Amendments to the United States Constitution are *reprinted at* Pet. App. 77a-78a.

STATEMENT

Following trial by a general court-martial, respondent was convicted of uttering 17 insufficient-funds checks, using methamphetamine, failing to go to his appointed place of duty, and wrongfully absenting himself from the base for 13 days, in violation of Articles 123a, 112a, and 86 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 923a, 912a, and 886. He was sentenced to 30 months' confinement, to forfeiture of all pay and allowances, and to a bad conduct discharge. The Air Force Court of Criminal Appeals affirmed, with the proviso that respondent should receive credit for one day's forfeitures. Pet.

App. 25a-53a. The Court of Appeals for the Armed Forces reversed and remanded. *Id.* at 1a-24a.

1. a. This case involves the constitutional validity of a rule excluding from court-martial proceedings in the armed forces any evidence of a polygraph examination. A polygraph examination is intended to produce an assessment of credibility; it is based on an examiner's subjective interpretation of physiological responses that are controlled by the subject's autonomous nervous system. The theory behind polygraph testing is that deception causes physiological reactions that are involuntary and that such reactions may be measured and interpreted.

While individual tests vary, polygraph examinations generally follow a common format. After a preliminary interview with the subject, the examiner asks a number of questions while measuring the subject's relative blood pressure (obtained from an inflated cuff on the upper arm) and other indications of blood flow, his "galvanic skin response" (*e.g.*, palmar sweating), and his respiration (obtained from sensors placed on the subject's chest or abdomen). The polygraph instrument records physiological responses on a chart, and the examiner manually marks when a response is uttered. The questions asked in most tests ordinarily fall into three broad categories: direct questions concerning the matter under investigation, irrelevant or neutral questions, and more general (so-called "control") questions concerning whether the subject has possibly engaged in other wrongful acts similar to the one under inquiry. The examiner poses the control questions in such a way as to elicit anxiety and a possibly deceptive response, in order to see a benchmark of the subject's physiological reactions when exhibiting concern about

lying. There are no standardized questions in a polygraph examination; the examiner devises the questions for the individual subject and may refine them after the preliminary interview. Each question is worded to elicit a "yes" or "no" answer. The test is typically limited to ten questions, because "[t]he restriction of blood flow in the arm produces ischemic pain after several minutes." W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in 1 *Modern Scientific Evidence* § 14-3.1.1, at 583 (D. Faigman et al. eds., 1997).

The examiner forms an opinion with respect to the subject's truthfulness by comparing the subject's physiological reactions to each set of questions. See generally 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-2(B), at 219-222 (2d ed. 1993); C. Honts & B. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D.L. Rev. 987, 989-993 (1995). If the responses do not elicit a significant enough variation in response, the examiner can adjust the polygraph instrument so that the recordings during the examination are more pronounced. The subject is usually required to be measured answering each set of ten questions (with the questions asked in varying orders) three different times. The polygrapher may base his inference of deception by comparing physiological responses (as recorded in peaks and valleys on the chart) to relevant and control questions. See generally Gianelli & Imwinkelried, *supra*, at 218.

b. In *United States* v. *Gipson*, 24 M.J. 246 (1987), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) concluded that polygraph techniques had reached a sufficient degree of reliability that evidence of a polygraph examination should not be routinely excluded from court-martial proceedings under Military Rule of Evidence 702.[1] The court noted that "[i]f anything is clear, it is that the battle over polygraph reliability will continue to rage," but it concluded that "until the balance of opinion shifts decisively in one direction or the other, the latest developments * * * should be marshaled at the trial level." 24 M.J. at 253. Accordingly, the court held that a serviceman who testifies at his court-martial trial is entitled to lay a foundation showing the scientific basis for polygraph results consistent with his exculpatory testimony. *Id.* at 252-253.

On June 27, 1991, "[b]y the authority vested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [*i.e.*, the UCMJ]," the President responded to *Gipson* by promulgating Military Rule of Evidence 707.[2] See Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.). The drafters' commentary that ac-

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[1] Military Rule of Evidence 702, like its counterpart in the Federal Rules of Evidence, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[2] Article 36(a) of the UCMJ, 10 U.S.C. 836(a), provides that "[p]retrial, trial, and post-trial procedures, including modes of proof * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

companied the rule explained its adoption by reference to several policies:

> There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near-infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). * * * There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the [court-martial] members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of the polygraphs. * * * Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system.

Pet. App. 82a-83a. Those considerations, the drafters stated, warrant "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial." *Id.* at 83a.

2. On March 27, 1992, respondent, an airman stationed at March Air Force Base, California, opened a checking account with the Security Pacific Bank with a $277 deposit. He made no arrangements for his pay to be deposited into the account, and he withdrew $200 on the same day the account was opened. On March 31, 1992, respondent telephoned the bank and

stated that he had lost his ATM card and the temporary checks that the bank had issued for the account. He was apparently told that the account would be closed for security reasons. After that telephone call, between April 1 and May 3, respondent wrote 17 checks on the account, totalling approximately $3,300 in checks drawn on insufficient funds. See Pet. App. 25a; 3 Trial Rec. 237-245, 249.

In late March 1992, as he was beginning the Security Pacific scheme, respondent volunteered to assist the Air Force Office of Special Investigations (OSI) with drug investigations, and informed OSI that he had information on two civilians who were dealing in significant quantities of drugs. Pet. App. 2a, 26a. On April 7, 1992, one of the OSI agents supervising respondent requested that respondent submit to a urine test. Respondent agreed, but he stated that he could not provide a urine specimen then, because he urinated only once a day. He submitted to a urinalysis on the following day. On May 14, 1992, OSI agents learned that respondent's urine had tested positive for methamphetamine. *Id.* at 26a-27a.

On April 10, 1992, two days after providing a urine sample, respondent agreed to take a polygraph administered by an OSI examiner. According to the examiner, respondent's polygraph charts "indicated no deception" when respondent denied that he had used drugs since joining the Air Force. Pet. App. 2a-3a, 26a-27a. Later that month, on April 30, 1992, respondent unaccountably failed to appear for work and could not be found on the base. Respondent was not heard from again until May 13, 1992, when an Iowa State Patrolman telephoned the base with news that respondent had been arrested in that State following a routine traffic stop; upon learning that respondent

was AWOL, the patrolman held respondent for return to the base. See 3 Trial Rec. 258-259, 265-267.

At his trial, respondent advised the court that he intended to testify in his defense, and that he wished to rely on "the results of the exculpatory polygraph" to corroborate "an innocent ingestion defense" to the drug charges. 2 Trial Rec. 42, 43-44. Respondent argued that Rule 707 "is unconstitutional if it prohibits an accused from introducing relevant and helpful exculpatory evidence," and he argued that he should be permitted to lay a foundation "to show that in this particular case * * * the polygraph results are relevant and helpful." *Id.* at 44.

The military judge noted that "[f]or evidence to be helpful, the testimony of the polygrapher would have to be in an area in which the factfinder himself needs help in making a decision." 2 Trial Rec. 46. In his view,

> the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant.

Ibid. The military judge also noted that "[t]he fact finder might give * * * too much weight" to polygraph testimony, and that arguments about such testimony could take "an inordinate amount of time and expense. * * * Given those concerns, I don't believe that the constitution prohibits the President from appropriately ruling that polygraph evidence will not be admitted in a court-martial." *Ibid.* Respondent later testified that he did not recall "knowingly" ingesting methamphetamine. He was convicted. Pet. App. 3a-4a.

3. The Air Force Court of Criminal Appeals, sitting en banc, rejected respondent's contention that the exclusion of the polygraph evidence deprived him of a fair trial. Pet. App. 25a-53a. After reviewing this Court's decisions in *Washington* v. *Texas*, 388 U.S. 14 (1967), *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Rock* v. *Arkansas*, 483 U.S. 44 (1987), see Pet. App. 32a-35a, the court concluded that the Constitution forbids evidentiary rules that "*arbitrarily* limit the accused's ability to present reliable evidence," "*arbitrarily* limit admission [of evidence] by the defense to a greater degree than by the prosecution," or "*arbitrarily* infringe on the right of the accused to testify on his own behalf." *Id.* at 40a.

The court noted that Rule 707 is "equally applicable to both the prosecution and the defense" and does "not infringe on the right of the accused to testify on his own behalf." Pet. App. 43a. It also observed that Rule 707 could not be viewed as an "arbitrary" limitation on reliable evidence, because "[t]he President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning." Pet. App. 40a. The court explained that there remain "valid concerns" about polygraph examinations and that:

> The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the value of the evidence.

Id. at 41a. The court concluded "[w]hile it might be arbitrary for the President to promulgate a rule" barring evidence that is widely accepted by courts as

reliable, "such as fingerprint evidence," (*id.* at 43a), the President acted within his authority in barring polygraph evidence, which routinely is ruled inadmissible by the civilian courts (*id.* at 42a-43a).

Judge Pearson, joined by Judge Schreier, dissented in part. Pet. App. 49a-53a. He believed that properly conducted polygraph examinations may provide "vital" evidence in a case in which the defendant's credibility "becomes the whole ball game." *Id.* at 51a.

4. By a three to two vote, the United States Court of Appeals for the Armed Forces reversed. The court agreed with respondent's claim that Rule 707 "violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by" respondent. Pet. App. 4a. Assuming that the President properly promulgated Rule 707 pursuant to the UCMJ, see Pet. App. 7a, the court concluded that, under *Rock* v. *Arkansas*, *supra*, the President's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." Pet. App. 8a (quoting *Rock*, 483 U.S. at 61). The court acknowledged that *Rock* "concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony," but it could "perceive no significant constitutional difference between the two." Pet. App. 9a.

Finally, the court noted that in *Montana* v. *Egelhoff*, 116 S. Ct. 2013 (1996), this Court upheld a state "statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue." Pet. App. 13a. The court observed, however, that *Egelhoff* was a "fragmented" decision that is best read as "founded on the power of the state to define crimes

and defenses." *Id.* at 14a. The court also found *Egelhoff* inapposite because Rule 707 does not address a fact to be proved, but instead "bars otherwise admissible and relevant evidence based on the mode of proof by categorically excluding polygraph evidence. While the plurality in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n.1, only four justices joined in that observation." Pet. App. 15a.[3]

Judges Sullivan and Crawford filed separate dissents. Pet. App. 16a-24a. Judge Sullivan's dissent was based on his concurring opinion in *United States* v. *Williams*, 43 M.J. 348 (C.M.A. 1995), cert. denied, 116 S. Ct. 925 (1996), a case in which the court of appeals had declined to address the constitutional validity of Rule 707, because the accused did not testify. Pet. App. 67a-68a. Writing separately in *Williams*, Judge Sullivan concluded that polygraph evidence is inadmissible under Military Rule of Evidence 608, which restricts what evidence may be offered in support of a witness's "character for * * * truthfulness." *Id.* at 75a. Judge Sullivan believed, moreover, that such evidence "infringes on the jury's role

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[3] The court also noted that in *Wood* v. *Bartholomew*, 116 S. Ct. 7 (1995) (per curiam), this Court summarily reversed the Ninth Circuit's determination that a state prosecutor violated his duties under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose the results of certain polygraph examinations. Pet. App. 12a-13a. The court observed that *Bartholomew* involved "prosecution witnesses, not the accused," and it added that while this Court "noted that polygraph evidence was inadmissible under [state] law, * * * [t]he constitutionality of the state law was not before the Court and * * * was not addressed." *Id.* at 12a-13a.

in determining credibility," because "[o]ur adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes." *Id.* at 75a-76a (internal quotation marks omitted). In his view, Rule 707 "properly" addresses those concerns. *Id.* at 76a.

Judge Crawford argued that a defendant's right to present relevant evidence "is 'not * * * absolute'," and must yield to policy considerations such as those that supported the President's decision to adopt Rule 707. Pet. App. 17a, 21a. She also took issue with the court's characterization of *Egelhoff*, noting that the four-Justice plurality and the four dissenting Justices agreed "that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so." *Id.* at 21a. Finally, Judge Crawford argued that the court's ruling would have a seriously adverse impact on the military's "worldwide system of justice." *Ibid.*

SUMMARY OF ARGUMENT

I. Military Rule of Evidence 707, which establishes a per se bar on the admissibility of polygraph evidence in courts-martial, is valid under the Sixth Amendment. A polygraph is an instrument that records physiological responses to questions and produces data that an examiner interprets to form a subjective opinion about the subject's credibility at the time. It is based on the theory that deception results in essentially uncontrollable responses by the subject's autonomous nervous system, and that those responses can be interpreted as evidence of honesty or deception.

A criminal defendant does not have an unqualified right under the Sixth Amendment to present any evidence that is arguably relevant to a fact at issue.

Rather, trial proceedings are governed by rules of evidence that are themselves designed to produce a reliable result and to further valid policy interests. Many evidentiary rules restrict or preclude admission of relevant and probative evidence, and such rules are constitutional so long as they are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas*, 483 U.S. 44, 56 (1987).

A per se rule prohibiting admission of polygraph evidence serves legitimate interests. First, for decades scientists have engaged in an arguably unresolvable debate over whether polygraph examinations are reliable. Significant doubts persist about whether polygraphs are verifiable and replicable. That scientific disagreement makes it particularly appropriate for courts to defer to the appropriate rulemaking authority's determination to bar polygraph evidence. The rule is further supported by the intrusion of polygraph evidence on functions traditionally performed by the trier of fact: assessing credibility and deciding the ultimate issue of guilt or innocence based on all of the evidence adduced at trial. A per se rule against polygraph evidence also avoids unnecessary collateral litigation over the evidentiary value of a polygraph result in any given situation. Finally, the existence of widespread judicial support for exclusion of such evidence further justifies the President's reasonable judgment in promulgating the per se prohibition on admission of polygraph evidence.

II. Not only does the decision by the court below conflict with general principles of Sixth Amendment jurisprudence, it is particularly unwarranted in the military context, where deference to the political branches of government is at its apex. It is well settled that the constitutional requirements for trials in

civilian life do not necessarily apply with equal force to courts-martial and that procedural restrictions may be appropriate in the military context in view of the specialized nature of military life and the military's primary function to defend the Nation. Thus, a servicemember challenging the rule has an "extraordinarily weighty" burden in "overcom[ing] the balance struck by Congress." *Weiss* v. *United States*, 510 U.S. 163, 177-178 (1994). In light of the substantial reasons for prohibiting admissibility of polygraph evidence, respondent cannot meet that burden.

ARGUMENT

I. THE PER SE EXCLUSION OF POLYGRAPH EVIDENCE IN A CRIMINAL CASE IS VALID UNDER THE SIXTH AMENDMENT

A. Restrictions On The Admissibility Of Evidence Are Constitutional If They Are Reasonable And Serve Legitimate Interests

Although the Constitution guarantees a fair trial through the Due Process Clause, the Sixth Amendment defines "the basic elements of a fair trial," including the right to confrontation, the right to compel testimony, and the right to counsel. *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984). Those Sixth Amendment rights "guarantee[] criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)), so that the trier of fact "may decide where the truth lies," *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). As this Court has observed, the right to present a complete defense would be an "empty one" if the government were permitted to exclude competent, reliable evidence that is central to the defendant's

claim of innocence, for the exclusion of such exculpatory evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690-691 (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)).

Nevertheless, a defendant's right to present relevant evidence in his defense is not absolute. The Court has consistently recognized that "[n]umerous state procedural and evidentiary rules control the presentation of evidence." *Rock* v. *Arkansas*, 483 U.S. 44, 55 n.11 (1987); *Washington* v. *Texas*, 388 U.S. at 23 n.21. Under those rules, a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). Testimony may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see the evidence admitted." *Crane*, 476 U.S. at 690; see *Michigan* v. *Lucas*, 500 U.S. 145, 151 (1991) (upholding exclusion of defense evidence for failure to comply with notice requirement).

The principle that a defendant may not require a court to admit all relevant, exculpatory evidence runs throughout the standard rules of evidence. For example, the Federal Rules of Evidence authorize a court to exclude relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (Fed. R. Evid. 403); evidence of other crimes or wrongs to prove character in order to show action in conformity therewith (Fed. R. Evid. 404(b)); evidence covered by a rule of privilege (Fed. R. Evid. 501); expert testimony that is insufficiently reliable

to amount to "scientific knowledge" that would "assist the trier of fact" (Fed. R. Evid. 702); expert testimony on an ultimate issue of a criminal defendant's mental state constituting an element of the crime (Fed. R. Evid. 704); and hearsay evidence unless covered by an exception (Fed. R. Evid. 802). Although some of those rules permit case-by-case adjudication of the admissibility of a particular item of evidence, others operate in a categorical fashion to establish per se rules of exclusion.[4]

In reviewing the constitutionality of an evidentiary rule of exclusion, this Court looks to whether the rule is "arbitrary or disproportionate to the purposes [it is] designed to serve"—that is, "whether the interests served by [the] rule justify [its] limitation" on the admission of evidence. *Rock*, 483 U.S. at 56; *Lucas*, 500 U.S. at 151 ("Restrictions on a criminal defendant's right to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'") (quoting *Rock*, 483 U.S. at 56). As the plurality noted in *Montana* v. *Egelhoff*, 116 S. Ct. 2013 (1996), in which the Court upheld Montana's prohibition of evidence of voluntary intoxication on the issue of whether the defendant possessed a requisite mental state, "the introduction of relevant evidence can be limited by the State for a 'valid' reason." *Id.* at 2022 (plurality opinion of Scalia, J.); see *id.* at 2028-2029

[4] For example, the determination whether evidence should be excluded under Rule 403 is typically made on an individualized basis. In contrast, Rule 404(b) is categorical in excluding other act evidence to prove character in order to show action in conformity therewith. See also *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1932 (1996) (rejecting case-by-case balancing test for psychotherapist-patient privilege under Rule 501).

(O'Connor, J., dissenting) (arguing that Montana improperly barred intoxication evidence for the sole purpose of increasing convictions, whereas "[t]he *purpose* of the familiar evidentiary rules is * * * to vindicate some other goal or value—*e.g.*, to ensure the reliability and competency of evidence"); *id.* at 2032 (Souter, J., dissenting) ("A State may typically exclude even relevant and exculpatory evidence if it presents a valid justification for doing so."). Rule 707's per se exclusion of polygraph results and the opinion of the polygraph examiner is a proportionate means to serve valid interests, and thus does not abridge the Sixth Amendment.

B. A Per Se Rule Excluding Polygraph Results Serves Legitimate Interests In Promoting Fairness And Reliable Fact-Finding

As the Commander-in-Chief, the President has the authority to promulgate rules of evidence applicable in courts-martial. U.S. Const. Art. II, § 2; 10 U.S.C. 836. Rule 707 evenhandedly bars polygraph evidence whether offered by the prosecution or the defense. The drafters' commentary that accompanied Rule 707 enumerated several factors underlying adoption of the Rule: (1) the scientific controversy over the reliability of polygraph examinations; (2) the danger that the opinion of the polygraph examiner will intrude on the jury's function of assessing credibility; (3) the danger that jurors will accord excessive weight to the expert's testimony; (4) the danger that the focus of the trial will shift from the guilt or innocence of the accused to the validity of the polygraph examination; and (5) the time-consuming collateral litigation to which the admissibility of polygraph evidence would give rise, with the atten-

dant burden on the administration of military justice. See Pet. App. 82a-83a. In light of these valid, nonarbitrary factors, the military's rule excluding evidence of the results of polygraph examinations from courts-martial does not violate the Sixth Amendment.

1. *Legitimate doubt exists in the scientific community over the reliability of polygraphs*

An important function of evidentiary rules is the exclusion of certain categories of evidence that are deemed insufficiently reliable, as demonstrated by the hearsay rule, Fed. R. Evid. 802. See *Egelhoff*, 116 S. Ct. at 2017. One need not take sides in the debate over polygraph testing to recognize that the reliability of such testing is widely questioned by scientists, Congress, and the courts.[5]

a. For more than a century, scientists have conducted numerous studies in attempts to develop verifiable and replicable proof that a subject's lie produces measurable physiological responses. See generally J. Matte, *Forensic Psychophysiology Using The Polygraph* 11-101 (1996) (tracing history of lie detection efforts); S. Abrams, *The Complete Polygraph Handbook* 2-8 (1989) (same). Some studies attempt to create laboratory conditions that mimic experiences

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[5] In part for that reason, in federal criminal trials, Department of Justice policy "opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test * * * [and admonishes] [g]overnment attorneys * * * from seeking the admission of favorable examinations which may have been conducted during the investigatory stage" of the case. III(a) U.S. Department of Justice, United States Attorneys' Manual § 9-13.310 (1988) (Department Policy Toward Polygraph Use).

of real subjects; others compare information obtained in real cases to verify findings of deceptiveness. The Office of Technology Assessment (OTA) evaluated all of the available studies in a comprehensive monograph published in 1983. See U.S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum* (OTA-TM-H-15, Nov. 1983) (OTA Study). The OTA Study concluded that "no overall measure of single, simple judgment of polygraph testing validity can be established based on available scientific evidence":

> There are two major reasons why an overall measure of validity is not possible. First, the polygraph test is, in reality, a very complex process that is much more than the instrument. Although the instrument is essentially the same for all applications, the types of individuals tested, training of the examiner, purpose of the test, and types of questions asked, among other factors, can differ substantially. A polygraph test requires that the examiner infer deception or truthfulness based on a comparison of the person's physiological responses to various questions. For example, there are differences between the testing procedures used in criminal investigations and those used in personnel security screening. Second, the research on polygraph validity varies widely in terms of not only results, but also in the quality of research design and methodology. Thus, conclusions about scientific validity can be made only in the context of specific applications and even then must be tempered by the limitations of available research evidence.

Id. at 4. In the years since publication of the OTA study, numerous additional studies of polygraphs have been performed. The validity of such studies has sparked considerable debate.

The editors of the most recent treatise on scientific evidence observe that "[s]cientific opinion about the validity of polygraph techniques is extremely polarized," and accordingly present the arguments pro and con without attempting to resolve definitively whether polygraph testing provides a valid means of ascertaining the credibility of a subject in the various contexts in which such examinations are administered. 1 D. Faigman et al., *Modern Scientific Evidence* § 14-1.4, at 565 n.* (1997).[6] See also 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-2(C), at 225 (2d ed. 1993) ("The validity of polygraph testing in criminal investigations remains controversial."); see also *id.* at 227 ("A number of authorities have questioned the validity of polygraph testing."). Even strong proponents of polygraph testing only venture to say that "the polygraph is a useful diagnostic tool for assessing truthfulness," while acknowledging that many applications of polygraph tests are "undesirable" and "objectionable." D. Raskin et al., "The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests," in 1 Faigman, *supra*, §§ 14-2.2.3 to 14-2.3, at 581-582. Two critics of the accuracy of polygraphs, however, have

[6] Compare D. Raskin et al., "The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests," § 14-2.0, at 565-582, in 1 *Modern Scientific Evidence* (D. Faigman et al. eds., 1997) with W. Iacono and D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in *ibid.*, § 14-3.0, at 582-618.

maintained that the validity of the control-question testing method of polygraph examinations—the approach preferred by polygraph proponents—"is little better than could be obtained by the toss of a coin." W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in 1 Faigman, *supra* § 14-5.3, at 629. That disagreement confirms the continuing validity of the view of the OTA, whose 1983 report concluded that "[o]verall, the cumulative research evidence suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant." OTA Study, *supra*, at 5.[7]

[7] There is no doubt that the polygraph can accurately measure certain physiological responses to accusatory questioning and that a correlation appears to exist between a fear of detection and a subject's physiological response. Critics argue, however, that these responses have not been shown to be different from physiological responses caused by other emotions:

> [T]here is no reason to believe that lying produces distinctive physiological changes that characterize it and only it. . . . [T]here is no set of responses—physiological or otherwise—that humans emit only when lying or that they produce only when telling the truth. . . . No doubt when we tell a lie many of us experience an inner turmoil, but we experience a similar turmoil when we are falsely accused of a crime, when we are anxious about having to defend ourselves against accusations, when we are questioned about sensitive topics—and, for that matter, when we are elated or otherwise emotionally stirred.

Giannelli & Imwinkelried, *supra*, at 216-217 (quoting B. Kleinmuntz & J. Szucko, *On the Fallibility of Lie Detection*, 17 Law & Soc'y Rev. 85, 87 (1982)). See also D. Lykken, *The Lie Detector and the Law*, 8 Crim. Def. 19, 21 (1981) ("But people do not all react in the same way when they are lying and, more

b. Congress has reached similar conclusions about the accuracy of polygraphs as a means of detecting deceit. After extensive hearings in 1965, the Committee on Governmental Operations of the House of Representatives concluded:

> There is no "lie detector." The polygraph machine is not a "lie detector", nor does the operator who interprets the graphs detect "lies." The machine records physical responses which may or may not be connected with an emotional reaction—and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.

H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Following further hearings and study, the same conclusions were reached in 1976. *The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings on H.R. 795 Before the House Comm. on Government Operations*, 94th Cong., 2d Sess. (1976). And in 1988, as a result of continuing doubts about the usefulness and accuracy of polygraphs as a means of detecting deceit, Congress restricted the use of polygraphs in employment decisions. See Employee Polygraph Protection Act of 1988, 29 U.S.C. 2001 *et seq.*

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important, any reaction that you might display when answering deceptively you might also display another time, when you are being truthful"); U.S. Department of Defense, *The Accuracy and Utility of Polygraph Testing* 3 (1984) (noting limitations in research conducted on polygraphs but stating that "the research produces results significantly above chance").

c. Courts have noted the highly subjective nature of polygraph testing. Because a polygraph examination tests a person's physiological reactions to questions posed at a particular time and place, the test is not replicable. Influences as varied as the emotional state of the subject on the day of the test, the room in which the polygraph is administered, the amount of sleep the subject has had the night before, and the number of cups of coffee the subject has consumed before the test may alter the physiological responses to questions. Thus, a person may produce a different polygraph chart in response to the same questions asked on a different day in a different location.[8]

Moreover, the polygrapher conducting the examination injects a high degree of subjectivity into the examination. Although both the American Polygraph Association and the American Association of Police Polygraphists publish standards for the use of polygraphs, neither organization "has the authority to compel members to comply with them," and "an estimated 2,000 other polygraph examiners * * * do not

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[8] Courts critical of polygraph testing have also pointed to the multiple variables that may influence the results of a polygraph test, including the physical and mental condition of the subject, the extent of the subject's nervousness, the subject's attitude toward the examiner, the subject's use of alcohol or drugs, distractions in the examination setting, the extent of a guilty subject's subjective belief in his own innocence, the competence and integrity of the examiner, the phrasing of the examiner's questions, and the appropriateness of the control questions. See, *e.g.*, *Brown* v. *Darcy*, 783 F.2d 1389, 1396 (9th Cir. 1986); *United States* v. *Alexander*, 526 F.2d 161, 165 (8th Cir. 1975); *People* v. *Monigan*, 390 N.E.2d 562, 569 (Ill. App. Ct. 1979).

belong to either society." C. Murphy & J. Murphy, "Polygraph Admissibility," in 10 *National Center for Prosecution of Child Abuse Update* 1 (1997). Accordingly, "[d]ue to the subjective nature of the polygraph (it is not uncommon for polygraphers to reach different conclusions after reviewing the same test results), the potential for abuse by the polygrapher being biased either for or against the suspect ('assisted' polygraph examinations), and the various levels of expertise of the polygraphers, the need for enforceable standards is of paramount importance." *Ibid.* (footnotes omitted). See also *People* v. *Monigan*, 390 N.E. 2d 562, 569 (Ill. App. Ct. 1979) (subjectivity of interpreting test results); *State* v. *Frazier*, 252 S.E.2d 39, 48-49 (W. Va. 1979) (same); *United States* v. *Alexander*, 526 F.2d 161, 164 n.6 (8th Cir. 1975) (general lack of training of polygraphers and the absence of adequate professional standards and qualifications); *People* v. *Anderson*, 637 P.2d 354, 360 (Colo. 1981) (en banc) (same).[9]

There is also evidence that a highly motivated subject (such as a defendant) may employ countermeasures to obscure an accurate reading of physiological

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[9] As Giannelli and Imwinkelried note:

> Even the proponents of the polygraph technique agree that the examiner, and not the machine, is the crucial factor in arriving at reliable results. The examiner's expertise is critical in (1) determining the suitability of the subject for testing, (2) formulating proper test questions, (3) establishing the necessary rapport with the subject, (4) detecting attempts to mask or create chart reactions, or other countermeasures, (5) stimulating the subject to react, and (6) interpreting the charts.

Scientific Evidence, *supra*, § 8-2(A), at 218.

responses.[10] Such countermeasures include hypnosis and biofeedback, ingestion of drugs, and subtle, surreptitious muscular movements during the examination. And although polygraphers can expect a subject to employ countermeasures, "[t]here is no good evidence as to how well these countermeasures work under real life conditions and no evidence at all concerning how frequently such countermeasures are successfully employed in real life by sophisticated subjects." Iacono & Lykken, *supra*, § 14-3.2.5, at 595-596.

A scientific technique whose reliability and helpfulness are so widely questioned by scientists, legislators, and courts may surely be made the subject of a categorical exclusionary rule. As this Court recently noted, "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Kansas* v. *Hendricks*, Nos. 95-1649 & 95-9075 (June 23, 1997), slip op. 12 n.3 (quoting *Jones* v. *United States*, 463 U.S. 354, 370 (1983)); *id.* at 3 (Breyer, J., dissenting) ("The Constitution permits a State to

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[10] Information on countermeasures is readily available. A search on the Internet by the Federal Bureau of Investigation Polygraph Unit produced some 3,000 hits. And many published sources on polygraphs contain discussions of countermeasures. See, *e.g.*, J. Matte, *Forensic Psychophysiology Using the Polygraph* 531-548 (1996); S. Abrams, *The Complete Polygraph Handbook* 185-186 (1989); V. Kalashnikov, *Beat the Box: The Insider's Guide to Outwitting the Lie Detector* 9-13 (1986). Thus, a highly motivated person who felt the need to attempt to trick the polygrapher could easily find information for that purpose.

follow one reasonable professional view, while rejecting another.").

2. *The admission of polygraph evidence intrudes on functions performed by the trier of fact*

Even assuming that polygraph testing had a high degree of reliability when properly administered, the President may reasonably be concerned about the potential encroachment of polygraph evidence on the proper functioning of the trier of fact. First, juries may be unduly swayed by the polygraph expert's opinion. As the Eighth Circuit explained in *Alexander*, 526 F.2d at 168:

> When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. During the course of laying the evidentiary foundation at trial, the polygraphist will present his own assessment of the test's reliability which will generally be well in excess of 90 percent. He will also present physical evidence, in the form of the polygram, to enable him to advert the jury's attention to various recorded physical responses which tend to support his conclusion. Based upon the presentment of this particular form of scientific evidence, present-day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to a polygraphist's opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case.

See also *Barefoot* v. *Estelle*, 463 U.S. 880, 926 (1983) (Blackmun, J., dissenting) (quoting P. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *A Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980) ("The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.")). Even if the accuracy of polygraph testing approaches the 90 percent level that polygraph proponents claim,[11] the danger that jurors will view the polygraph "as an absolute indicator of truth creates an overwhelming potential for prejudice when inaccurate results are introduced." *Brown* v. *Darcy*, 783 F.2d 1389, 1396 (9th Cir. 1986). The prospect that relevant evidence may "weigh too much with the jury and * * * so overpersuade them" is a legitimate basis for a categorical rule of exclusion. *Old Chief* v. *United States*, 117 S. Ct. 644, 650 (1997) (quoting *Michelson* v. *United States*, 335 U.S. 469, 476 (1948) (discussing propensity evidence)).

Second, even if polygraph evidence did not have a potentially pervasive influence on the jury, the admission of such evidence would nonetheless tend to infringe on the jury's role of determining witness credibility. "[T]ruth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and

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[11] See, *e.g.*, D. Raskin, *Methodological issues in estimating polygraph accuracy in field applications*, in 19 Canad. J. Behav. Sci./Rev. Canad. Sci. Comp. 389, 389 (1987). Raskin's claim has been sharply criticized. See, *e.g.*, Iacono and Lykken, in 1 Faigman, *supra*, at 610.

weight of such testimony to be determined by the jury or by the court." *Rock*, 483 U.S. at 54 (quoting *Washington* v. *Texas*, 388 U.S. at 22 (quoting *Rosen* v. *United States*, 245 U.S. 467, 471 (1918))). A polygrapher has no such "knowledge of the facts involved in a case," but rather can only purport to speak to the credibility of the subject at one particular examination.

Since time immemorial our system has entrusted credibility determinations to the judgment of juries, which assess credibility in reliance on their commonsense evaluations of demeanor, bias, and the plausibility of the narrative. See, *e.g.*, *State* v. *Porter*, No. SC 15363, 1997 WL 265202, at *27 (Conn. May 20, 1997) ("The jury has traditionally been the sole arbiter of witness credibility."); *Perkins* v. *State*, 902 S.W.2d 88, 94 (Tex. Ct. App. 1995) ("Even though serious doubts remain about the reliability of polygraph evidence, its unreliability is not the primary reason for its exclusion under our holding. Instead, we find that such evidence should be excluded because it impermissibly decides the issues of credibility and guilt for the trier of fact and supplants the jury's function.") (footnote omitted); *State* v. *Beachman*, 616 P.2d 337, 339 (Mont. 1980) ("It is distinctly the jury's province to determine whether a witness is being truthful."). An expert who opines based on a polygraph examination that a testifying defendant was truthful at the time of the test duplicates the jury's credibility-assessing function. It is entirely legitimate for an evidentiary system to preserve for the factfinder its unique province of weighing credibility based on first-hand observation of witnesses and of making the ultimate determination of guilt or innocence. Cf. Fed. R. Evid. 608 (limiting opinion evidence to support or attack

credibility); Fed. R. Evid. 704(b) ("No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.") .

That is especially true in the case of polygraph evidence. Unlike an abstruse area of science that ordinarily would be beyond the jury's ken unless explained by an expert witness, "[a] determination of whether a witness is telling the truth is well within the province of all jurors' understanding and abilities." *Porter*, 1997 WL 265202, at *27. See also D. Carroll, "How accurate is polygraph lie detection?" in *The Polygraph Test* 28 (A. Gale ed. 1988), ("an observer, regarding the [polygraph examinee's] general behaviour * * * does just as well as an experienced polygraph examiner"). As one federal court of appeals succinctly put it, "the jury is the lie detector." *United States* v. *Barnard*, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974).

3. *A per se prohibition on polygraph evidence serves the legitimate interest of avoiding unnecessary collateral litigation*

Because of the many elements of subjectivity associated with polygraphy and the lack of widespread acceptance of it in the scientific community, attempts to admit results of a polygraph examination will produce lengthy collateral litigation regarding the validity of the technique in general and the reliability of test results in particular cases. In each case, the party against whom the test results are introduced

can be expected to challenge the reliability of the results first before the court in an effort to prevent their admission and then, if they are admitted, before the jury. Because the validity of any particular polygraph test is dependent on a large number of variables—among them, the mental and physical suitability of the subject of the test, the competence and integrity of the examiner, the phrasing of the relevant questions, and the appropriateness of the control questions—the litigant has numerous potential avenues for attacking a test's reliability. The result in most cases is bound to be a time-consuming battle of experts who might differ not only on the validity of polygraphy in general, but also on the reliability of the particular polygraph test under consideration and the proper interpretation of the test results.

One state court has concluded that "the administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered. If a trial court were to adequately police the reliability of [polygraph] results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable." *State* v. *Grier*, 300 S.E.2d 351, 359 (N.C. 1983). Accord *Brown*, 783 F.2d at 1397; *United States* v. *Urquidez*, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973); *State* v. *Dean*, 307 N.W.2d 628, 650 (Wis. 1981); *People* v. *Barbara*, 255 N.W.2d 171, 196 (Mich. 1977). Protracted battles between "experts" over the methodology, meaning, and appropriateness of polygraph tests can occur even in jurisdictions with extensive experience in litigating over the admissibility of polygraphs. See *Commonwealth* v. *Mendes*, 547 N.E.2d 35, 36-37 (Mass. 1989) (evidentiary hearing on polygraph results and motion for new examinations took four days of court time even though polygraph evidence had been permitted in state courts for fifteen years).

4. *Widespread judicial support for a prohibition on polygraph admissibility further supports the reasonableness of a per se rule*

Uncertainty about the reliability of polygraph testing is reflected in the refusal of most courts to admit polygraph evidence. In promulgating Rule 707, it was not arbitrary of the President to take into account the overwhelming views of federal and state civilian courts on whether polygraph results should be admissible into evidence. The general rule in most States is that the results of polygraph examinations are inadmissible in criminal trials, primarily because of the lack of adequate scientific support for their reliability.[12] By and large, these courts adhere to the

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[12] See, *e.g.*, *Porter*, 1997 WL 265202, at *2; *In re Odell*, 672 A.2d 457, 459 (R.I. 1996) (per curiam); *People* v. *Sanchez*, 662 N.E.2d 1199, 1210 (Ill. 1996), cert. denied, 117 S. Ct. 392 (1996); *Contee* v. *United States*, 667 A.2d 103, 104 n.4 (D.C. 1995); *Commonwealth* v. *Sneeringer*, 668 A.2d 1167, 1174 (Pa. Super. Ct. 1995); *State* v. *Beard*, 461 S.E.2d 486, 492 (W. Va. 1995); *State* v. *Campbell*, 904 S.W.2d 608, 614-615 (Tenn. Crim. App. 1995); *Petition of Grimm*, 635 A.2d 456, 464 (N.H. 1993); *State* v. *Patterson*, 651 A.2d 362, 366 (Me. 1994); *Conner* v. *State*, 632 So.2d 1239, 1257 (Miss. 1993), cert. denied, 513 U.S. 927 (1994); *People* v. *Angelo*, 618 N.Y.S.2d 77, 78 (App. Div. 1994), aff'd, 666 N.E.2d 1333 (N.Y. 1996); *State* v. *Walker*, 493 N.W.2d 329, 335 (Neb. 1992); *State* v. *Hawkins*, 604 A.2d 489, 492 (Md. 1992); *Morton* v. *Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991); *State* v. *Staat*, 811 P.2d 1261, 1262 (Mont. 1991); *Tennard* v. *State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990)

general rule even where the parties consent to admission of polygraph evidence, holding that "the reliability of the polygraph" is insufficient "to permit unconditional admission of the evidence." *Dean*, 307 N.W.2d at 653.[13]

In the federal arena, neither the United States Code nor the Federal Rules of Evidence has a specific provision concerning the admissibility of polygraph results. Under the "general acceptance" test for scientific testimony that prevailed under *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), however, the federal appellate courts traditionally upheld the exclusion of polygraph evidence on the ground that the scientific theory of polygraph testing had not achieved general acceptance.[14] In *Daubert* v. *Merrell Dow*

(en banc) (per curiam), cert. denied, 501 U.S. 1259 (1991); *State* v. *Harnish*, 560 A.2d 5 (Me. 1989); *Haakanson* v. *State*, 760 P.2d 1030, 1034 (Alaska Ct. App. 1988); *Healy* v. *Healy*, 397 N.W.2d 71, 74 n.1 (N.D. 1986); *Johnson* v. *State*, 495 A.2d 1, 14 (Md. 1985), cert. denied, 474 U.S. 1093 (1986); *State* v. *Anderson*, 379 N.W.2d 70, 79 (Minn. 1985), cert. denied, 476 U.S. 1141 (1986); *State* v. *Dornbusch*, 384 N.W.2d 682, 685 (S.D. 1986); *State* v. *Copeland*, 300 S.E.2d 63, 69 (S.C. 1982), cert. denied, 460 U.S. 1103 (1983); *People* v. *Anderson*, 637 P.2d 354, 358 (Colo. 1981) (en banc); *State* v. *Biddle*, 599 S.W.2d 182, 185 (Mo. 1980); *State* v. *Catanese*, 368 So.2d 975, 981 (La. 1979); *State* v. *French*, 403 A.2d 424, 426 (N.H.), cert. denied, 444 U.S. 954 (1979); *State* v. *Steinmark*, 239 N.W.2d 495, 497 (Neb. 1976).

[13] See also, *e.g.*, *State* v. *Okumura*, 894 P.2d 80, 94 (Haw. 1995); *Mendes*, 547 N.E.2d at 41; *Robinson* v. *Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986); *People* v. *Anderson*, 637 P.2d 354, 362 (Colo. 1981) (en banc); *State* v. *Biddle*, 599 S.W.2d 182, 187 (Mo. 1980) (en banc); *Pulakis* v. *State*, 476 P.2d 474, 479 (Alaska 1970).

[14] *United States* v. *A&S Council Oil Co.*, 947 F.2d 1128, 1133-1134 (4th Cir. 1991); *Bennett* v. *City of Grand Prairie*, 883

Pharmaceuticals, 509 U.S. 579 (1993), the Court abandoned the *Frye* test and held that, under Federal Rule of Evidence 702, expert testimony may not be excluded solely because it is based on a scientific theory that has not yet achieved general acceptance; rather, the trial court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact." 509 U.S. at 592.[15] In the wake of *Daubert*, several courts of appeals have retreated from the categorical exclusion of polygraph evidence and have left the matter to trial courts.[16] No court of appeals, however, has concluded that polygraph testing is scientifically valid or that

F.2d 400, 405 & n.7 (5th Cir. 1989); *United States* v. *Miller*, 874 F.2d 1255, 1261 (9th Cir. 1989); *United States* v. *Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987); *United States* v. *Murray*, 784 F.2d 188, 188 (6th Cir. 1986); *Brown*, 783 F.2d 1389 at 1394-1395. But see *United States* v. *Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (en banc) (polygraph evidence not inadmissible *per se*); *Anderson* v. *United States*, 788 F.2d 517, 519 n.1 (8th Cir. 1986) (polygraph evidence admissible by stipulation).

[15] The *Daubert* Court provided a non-exclusive list of several factors that the trial court should consider in determining whether an expert's testimony rests on scientific knowledge: whether the theory or technique can be and has been tested, whether it has been subjected to peer review, whether the technique has a high known or potential rate of error, and whether the theory has attained general acceptance within the scientific community. 509 U.S. at 593-594.

[16] See *United States* v. *Cordoba*, 104 F.3d 225, 227-228 (9th Cir. 1997); *United States* v. *Williams*, 95 F.3d 723, 729 (8th Cir. 1996), cert. denied, 117 S. Ct. 750 (1997); *United States* v. *Kwong*, 69 F.3d 663, 667-669 (2d Cir. 1995), cert. denied, 116 S. Ct. 1343 (1996); *United States* v. *Sherlin*, 67 F.3d 1208, 1216-1217 (6th Cir. 1995), cert. denied, 116 S. Ct. 795 (1996); *United States* v. *Posado*, 57 F.3d 428, 434 (5th Cir. 1995).

the results of a polygraph test were reliable enough to be admitted into evidence.[17]

C. The Court Of Appeals Erred In Its Analysis Of The Per Se Bar On Polygraph Evidence

1. In concluding that Rule 707 violates the Sixth Amendment right to present a defense, the court of appeals relied on this Court's statement in *Rock* v. *Arkansas*, 483 U.S. at 61, that a "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." Pet. App. 8a. The court of appeals then found no "significant constitutional difference" between the

[17] In a variety of out-of-court settings, the United States government does conduct and make limited use of the results of polygraph examinations. For example, the Department of Defense views polygraphs as a tool that enhances the interview and interrogation process, especially in providing essential information to resolve national security issues and criminal investigations. Similarly, the Federal Bureau of Investigation conducts polygraphs within the context of criminal investigations, but its general policy cautions that "[t]he polygraph is to be used selectively as an investigative aid and results considered within the context of a complete investigation." FBI, Manual of Investigative Operations and Guidelines § 13-22.2(2) (1987). The investigative benefits of the polygraph have been described as follows:

> In the hands of a competent, well-trained and ethical examiner the polygraph can be a highly effective investigative tool. It can identify individuals who are withholding or distorting vital information, be one factor to eliminate possible suspects and even serve as a deterrent. Equally important, the psychological advantage created during the polygraph examination and interview process frequently results in confessions and admissions of guilt being obtained.

Murphy and Murphy, *supra*, at 2.

Court's holding that a State may not exclude a defendant's hypnotically refreshed testimony, and the issue presented here, which "concerns exclusion of evidence supporting the truthfulness of a defendant's testimony." *Id.* at 9a. If the court's interpretation of *Rock* were accepted, many categorical rules of exclusion found in the standard rules of evidence would be suspect. In fact, the court's reliance on *Rock* was misplaced.

Rock involved the defendant's constitutional right to testify and provide the jury with the defendant's own version of events. A bar of such evidence would seriously restrict the defendant's right to present a defense and would deprive the factfinder of highly relevant and probative information. At the same time, while hypnosis-induced recollections of the defendant may have an element of unreliability, the Court noted that the time-honored method for exposing weaknesses in testimony is cross-examination, 483 U.S. at 61, which may be coupled with expert testimony and cautionary instructions, *ibid.* In that setting, the Court held that a wholesale exclusion of the defendant's own testimony was not a proportionate means to respond to dangers to recollection posed by hypnosis.

In contrast to *Rock*, a defendant whose trial is governed by Rule 707 remains free to testify to his version of events. Rule 707 does not deprive the factfinder of the *substance* of the defendant's testimony; rather, it precludes only collateral polygraph evidence—to bolster or attack it. The validity of Rule 707 thus depends, not on a comparison to the result in *Rock*, but on an analysis of the interests underlying the per se prohibition on polygraph evidence. As we have discussed, the rule rationally serves valid inter-

ests in the fair and accurate adjudication of the ultimate issue. See pp. 18-33, *supra*. The court of appeals erred by failing to consider those interests.

2. The court of appeals also appeared to find Rule 707 arbitrary because other expert testimony is potentially admissible under Military Rule of Evidence 702, which permits a case-by-case inquiry pursuant to *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, *supra*. The Court observed that under *Daubert*, "the trial judge [acts as] a gatekeeper, trusted with responsibility to decide if novel scientific evidence was sufficiently relevant and reliable to warrant admission." Pet. App. 9a. *Daubert*, however, was not decided under the Sixth Amendment, and it does not preclude the adoption of otherwise-reasonable per se rules to govern particular forms of expert testimony. Indeed, even under *Daubert*, courts might conclude that an accumulated body of knowledge and experience with a particular category of "science" justifies a categorical determination that the evidence is not admissible under the rubric of "scientific knowledge."

In any event, polygraph evidence has sufficient distinctive features that it is not arbitrary to conclude that, unlike other forms of scientific evidence, polygraph results should be categorically barred from evidence. Although an element of judgment is usually present with respect to other scientific evidence that is routinely admitted at trials, such as analyses of ballistics, fingerprints, handwriting, voiceprints, and blood, polygraph testing, "albeit based on a scientific theory, remains an art with *unusual responsibility* placed on the examiner." *United States* v. *Wilson*, 361 F. Supp. 510, 512 (D. Md. 1973). More importantly, polygraph evidence is different from other scientific evidence in that it effectively consists of "an opinion

regarding the ultimate issue before the jury, not just one issue in dispute." *Brown*, 783 F.2d at 1396. As the court explained in *United States* v. *Alexander*, 526 F.2d at 169, "[t]he role of the jury after a polygraphist has testified that the results of a polygraph examination show that the defendant's denial of participation in the crime was fabricated is much more circumscribed [than after the testimony of other scientific experts]. If the [polygraph] testimony is believed by the jury, a guilty verdict is usually mandated." The opposite would be true when a defendant supports his credibility by a polygraph examination. Finally, other types of scientific evidence are often indispensable to the resolution of particular factual issues. Polygraph evidence, on the other hand, is never indispensable in light of the traditional, time-tested tools available to juries for making credibility determinations. *Daubert* thus does not control this Court's analysis of the constitutional validity of the per se exclusion of polygraph evidence.

Notably, before *Daubert*, when the courts generally applied a per se bar against polygraph evidence under the *Frye* test, federal and state courts found no Sixth Amendment obstacle to such a rule. See, *e.g.*, *Bashor* v. *Risley*, 730 F.2d 1228, 1238 (9th Cir.), cert. denied, 469 U.S. 838 (1984); *United States* v. *Gordon*, 688 F.2d 42, 44-45 (8th Cir. 1982); *Jackson* v. *Garrison*, 677 F.2d 371, 373 (4th Cir.), cert. denied, 454 U.S. 1036 (1981); *United States* v. *Glover*, 596 F.2d 857, 867 (9th Cir.), cert. denied, 444 U.S. 857, 860 (1979); *Connor* v. *Auger*, 595 F.2d 407, 411 (8th Cir.), cert. denied, 444 U.S. 851 (1979); *United States* v. *Lech*, 895 F. Supp. 582, 586 (S.D.N.Y. 1995); *People* v. *Price*, 821 P.2d 610, 663 (Cal. 1991), cert. denied, 506 U.S. 851 (1992);

People v. *Williams*, 333 N.W.2d 577, 580 (Mich. Ct. App. 1983); *State* v. *Conner*, 241 N.W.2d 447, 457-458 (Iowa 1976).[18] The fact remains, even after *Daubert*, that polygraph evidence has characteristics that justify specialized treatment under the rules of evidence. It is not arbitrary for appropriate authorities to conclude that the costs and dangers of admitting the evidence outweigh any limited contribution that polygraph evidence might make to the fair disposition of criminal trials.[19]

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[18] But see *United States* v. *Williams*, 39 M.J. 555, 558 (A.C.M.R. 1994) ("We held under the facts of this case that appellant's Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard on these foundational matters [regarding polygraph reliability], and allows for the possibility of admitting polygraph evidence."), decision set aside, 43 M.J. 348, 354 (C.M.A. 1995) (holding polygraph inadmissible in this case because defendant did not take the stand), cert. denied, 116 S. Ct. 925 (1996).

[19] Nor is Rule 707 an irrational ban on a category of evidence akin to those invalidated in *Washington* v. *Texas*, 388 U.S. 14 (1987), or *Crane* v. *Kentucky*, 476 U.S. 683 (1986). In *Washington* v. *Texas*, the Court held that a State could not prohibit a defendant from introducing the testimony of a co-defendant in order to prevent perjury, because it was "arbitrary" to disqualify an entire category of defense witnesses on the presumption that they were "unworthy of belief." 388 U.S. at 22. In *Crane* v. *Kentucky*, the Court held that a State could not bar evidence of the circumstances of a confession on the theory that the evidence had no relevance once the confession had been ruled voluntary. The Court explained that the evidence may remain highly relevant to the credibility of the confession, and that there was no "rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." 476 U.S. at 691. As discussed in the text, there is a rational justification for treating polygraph evidence in a distinctive fashion.

II. THE SIXTH AMENDMENT DOES NOT COMPEL ADMISSIBILITY OF POLYGRAPH RESULTS IN COURTS-MARTIAL

The constitutional theory embraced by the court of appeals not only conflicts with general principles of Sixth Amendment law applicable in state and federal civilian courts, it is particularly unwarranted and onerous in the military context. Thus, even if the court of appeals' application of the Sixth Amendment principles in the civilian context had merit, it would not justify invalidating a military rule of evidence, because respondent cannot meet his burden of demonstrating that a servicemember's need to introduce polygraph evidence in courts-martial overcomes the determination by the President to promulgate a per se rule prohibiting such evidence.

A. Procedural Rules Adopted For Military Courts-Martial Are Entitled To Deference By This Court

The Constitution grants Congress the power "[t]o make rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, Cl. 14. This Court has recognized that this power "creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights." *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion).

It is well established that certain Fifth and Sixth Amendment rights enjoyed by civilians are not appli-

cable to defendants in military proceedings. See, *e.g.*, *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969) ("The Fifth Amendment specifically exempts 'cases arising *in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger' from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury (emphasis supplied)."), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435, 436 (1987); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (no right to Fifth or Sixth Amendment trial by jury in trials by military commission). Although persons tried by courts-martial cannot be denied the Fifth Amendment's guarantee of due process of law, this Court has determined that the tests for applying that right differ and that limitations on due process generally exist in the military context. See *Weiss* v. *United States*, 510 U.S. 163, 176-177 (1994); *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).

With respect to military trials, this Court has sanctioned the military's use of evidentiary and procedural rules that differ from those that prevail in civilian courts. See *O'Callahan* v. *Parker*, 395 U.S. 258 (1969) ("Substantially different rules of evidence and procedure apply in military trials."); *id.* at n.4 ("For example, in a court-martial, the access of the defense to compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent on the approval of the prosecution.").[20]

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[20] Military courts are not compelled to adhere to rules of evidence grounded only in the Supreme Court's supervisory powers over the administration of justice in the federal courts. See, *e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 145 & n.12 (1953).

In assessing the need for a military court to adopt a certain rule or practice constitutionally mandated in civilian tribunals, this Court looks to "whether the factors militating in favor of [the practice] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-178 (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976)). That test is highly deferential:

> [T]he Constitution contemplates that Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline. Judicial deference thus is at its apogee when reviewing congressional decisionmaking in this area. Our deference extends to rules relating to the rights of servicemembers: Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.

Weiss, 510 U.S. at 177 (quotations and citations omitted). The court below erred in not giving the per se rule against polygraph admissibility the deference it deserved.

B. Respondent's Interest in Introducing Polygraph Evidence Does Not Outweigh The Reasons For Establishing A Per Se Rule Prohibiting Such Evidence

As this Court has recognized, "the military in important respects remains a "specialized society separate from civilian society," *Weiss*, 510 U.S. at 174 (quoting *Parker* v. *Levy*, 417 U.S. 733, 743 (1974)); see also *Loving* v. *United States*, 116 S. Ct. 1737, 1751 (1996), whose essential function is "to fight or be

ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). Military trials are necessary "to maintain discipline," but they are "merely incidental to an army's primary fighting function." *Quarles*, 350 U.S. at 17. "To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.* Thus, the introduction of procedural complexities into military trials is "a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf* v. *Henry*, 425 U.S. at 45-46.

The court of appeals' opinion does not reflect consideration of those factors, which have long informed this Court's assessment of rules designed for military trials. Nor does that decision accord the great deference properly due to the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177; *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986). Invoking his powers under the Constitution, see Art. II, § 2, Cl. 1, and an express congressional delegation authorizing him to prescribe rules of evidence for courts-martial, see 10 U.S.C. 836(a), the President concluded that polygraph evidence is unnecessary for reliable credibility assessments, that its admission could confuse the trier of fact, and that case-by-case litigation about its admissibility would waste the time of servicemembers whose "primary function" (*Quarles*, 350 U.S. at 17) is the Nation's defense. Against those considerations is respondent's assertion that the polygraph evidence would enhance his credibility in denying that he had used drugs since joining the Air Force. Yet prohibiting respondent from introducing the results of polygraph examinations neither lessens the prosecution's burden of proof nor limits respondent's opportunity to testify at a court-martial on any relevant topic. In light of the continuing disagreements among polygraph experts over the validity and reliability of polygraphs, the propensity of polygraph evidence to confuse the trier of fact, and the likelihood that the introduction of polygraph evidence would lead to lengthy disputes over the methodology and results of polygraph testing in a particular circumstance, respondent cannot carry his burden of demonstrating that "the factors militating in favor of [allowing polygraph evidence to be considered as evidence] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-178. Deference in formulating such an evidentiary rule is particularly appropriate where, as here, the scientific evidence on the validity of polygraphs is open to serious debate and polygraph test results may be manipulated. Thus, even if generally applicable Sixth Amendment principles were found not to justify a per se rule prohibiting polygraph evidence, the President and Congress may constitutionally establish such a rule in the context of courts-martial.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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